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No. 97-1928

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VERNA EMERY,

Petitioner,

v.

AMERICAN GENERAL FINANCE, INC., AMERICAN GENERAL FINANCE CORP., and JOHN DOES 1-10,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The petitioner, Verna Emery, seeks a writ of certiorari in this case to resolve conflicts of law created by the Seventh Circuit's opinion in *Emery v. American General Finance, Inc.*, 134 F.3d 1321 (7th Cir. 1998).

The Seventh Circuit's decision precludes *corporate subsidiaries* from constituting RICO "persons." Because the decision renders it impossible for a subsidiary to constitute a RICO person, it contradicts the plain language of the RICO statute and conflicts with decisions of eight Circuit Courts of Appeal.

Ms. Emery offers this Reply in Support of Petition for Writ of Certiorari to respond to new points raised in the opposition brief of respondents American General Finance, Inc. and American General Finance Corp. (collectively, "respondents").

ARGUMENT

I.

THE SEVENTH CIRCUIT'S DECISION PRECLUDES PLAINTIFFS FROM SEEKING RELIEF UNDER THE RICO STATUTE AGAINST CORPORATE SUBSIDIARIES THAT COMMIT FRAUD.

The Seventh Circuit's opinion in this case rejected the plain language of the RICO statute by effectively holding that a corporate subsidiary can *never* be a RICO "person." In practical terms, the Seventh Circuit's holding means that a plaintiff can no longer seek relief under the RICO statute against a subsidiary member of a corporate family that commits fraud. Now, for example, a large, reputable corporation's smaller subsidiary

can orchestrate a fraudulent scheme and carry it out under the protective wing of its parent corporation, because, in the Seventh Circuit, it cannot be sued for RICO violations.

Such a holding cannot be reconciled with the plain language of the RICO statute, which unambiguously states that a RICO person can be "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. §1691(3).

Respondents' brief provides little opposition to Ms. Emery's petition for a writ of certiorari. Rather, respondents present page after page of *factual* background, presumably hoping to portray the Seventh Circuit's decision as routine and fact-bound. Respondents address the main point of Ms. Emery's brief in five short paragraphs that merely recite the Seventh Circuit's holding and state summarily that the Seventh Circuit decision was correct.

The defect in the Seventh Circuit's logic is a mistaken analogy between corporations that operate with subsidiaries and corporations that operate with internal divisions. The Seventh Circuit based its reasoning in this case on the idea that corporate subsidiaries serve the same purposes as corporate divisions. Because a corporation can choose to conduct its activities either through its own divisions or through subsidiaries, and because corporate *divisions* cannot constitute RICO persons, the Seventh Circuit reasoned corporate *subsidiaries* that engage in a pattern of racketeering activity similarly *cannot constitute RICO persons*. The Seventh Circuit stated:

> There is no allegation that by using subsidiaries rather than divisions the AGF group somehow made it easier to commit or conceal the fraud of which the plaintiff complains.

Slip Op., p. 6. In practice, of course, there are distinct differences between corporate divisions and separate, free-standing subsidiary corporations. Petitioner is not aware of any other context in which corporate divisions and corporate subsidiaries are treated alike simply because they carry out similar functions.

In direct contravention of its plain language, the Seventh Circuit limited the RICO statute via an inapt analogy that bears no relationship to the language or intent of Congress. When Congress has spoken clearly, the plain language of the statute prevails. *Hubbard v. United States*, 514 U.S. 695, 708 (1995) (courts should give effect to "plain language of an Act of Congress, particularly when the Legislature has specifically defined the controverted term").

II.

THE SEVENTH CIRCUIT IMPROPERLY PLACED MS. EMERY IN THE VERY "CATCH-22" SITUATION THAT IT PURPORTED TO REJECT.

Because Ms. Emery did not have the opportunity to take discovery in this case, she did not know which individuals devised the fraudulent activities on behalf of the corporate subsidiary. The pleading requirements of RICO and Fed.R.Civ.P. 9(b) placed Ms. Emery in an impossible position: the District Court had barred her from taking discovery pending its decision on respondents' motion to dismiss, yet it dismissed her claims

against the "John Doe" defendants because she could not identify them by name and allege that they *controlled* their corporations:

> the individual defendants are not alleged to control the corporation alleged to have committed the frauds that constitute the RICO violation, or a corporate division or other identifiable branch or unit that they somehow carved out from the legitimate corporate hierarchy and made their own little bailiwick. They are alleged merely to have devised the fraud . . . so that if "devisers" are RICO violators there would be a RICO violation whenever a corporation engaged in a pattern of racketeering activity—and thus automatically—even though the statute makes the conduct of or participation in the corporation's affairs a separate element of liability.

Slip Op., p. 8. The Seventh Circuit, then, based its dismissal of the John Does' claim in part upon the position that individual RICO defendants must be in positions of corporate control. Such a holding conflicts directly with the Third Circuit's decision in *United States v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994) ("one may 'take part in' the conduct of an enterprise by knowingly implementing decisions, as well as by making them").

Similarly, the Seventh Circuit held Ms. Emery to an impossible standard by holding that she failed to allege a pattern of racketeering activity because she *could not identify* others who received the same letter by name and, therefore, failed to plead other instances of fraud with particularity. Although the Seventh Circuit acknowledged that Ms. Emery was precluded from taking

any discovery concerning these matters and that Fed. R.Civ.P. 9(b) is "satisfied by a showing that further particulars of the alleged fraud could not have been obtained without discovery," Slip Op., p. 4, it nevertheless refused to reverse the District Court's dismissal of the complaint.

Respondents seize upon the Seventh Circuit's statement that Ms. Emery "didn't explore the possibility of obtaining from the defendants or other sources, without discovery, the identity of other recipients of the form letter . . . ." Slip Op., p. 4. What "other sources" besides formal discovery exist in such a scenario? It is hardly within the realm of possibility that respondents would have agreed to *informally* produce information to Ms. Emery's attorneys after the District Court stayed discovery.

Ms. Emery established that the form document she received constituted mail fraud. Because the identities of other recipients were completely within the purview of the defendants, she satisfied the pleading requirements of Fed.R.Civ.P. 9(b) by alleging that the other class members received the same form letter. *New England Data Serv., Inc. v. Becher*, 829 F.2d 286 (1st Cir. 1987); *Michaels Building Company v. Ameritrust Company, N.A.*, 848 F.2d 674 (6th Cir. 1988); *Schiffels v. Kemper Fin. Serv., Inc.*, 978 F.2d 344 (7th Cir. 1992).

CONCLUSION

For all the reasons stated above, petitioner Verna Emery respectfully requests that the Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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